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Human rights and transnational corporations and other business enterprises

Note by the Secretary-General

The Secretary-General has the honour to transmit to the General Assembly the report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, submitted pursuant to Human Rights Council resolutions 17/4 and 26/22.

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Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises

Summary

In the present report, the Working Group on the issue of human rights and transnational corporations and other business enterprises looks at the human rights impacts of agro-industrial operations, especially with respect to the production of palm oil and sugarcane, on indigenous peoples and local communities. It examines the duties and responsibilities, under the Guiding Principles on Business and Human Rights, of host and home Governments and business enterprises, including financial institutions and traders, in preventing, mitigating and addressing these impacts. It also offers reflections on issues of particular importance, such as transparency, leverage, meaningful consultation, multi-stakeholder initiatives and access to remedy.

The Working Group makes recommendations to States, business enterprises, multi-stakeholder initiatives and industry associations, civil society and international organizations on transforming current practices in order to benefit communities affected by agro-industrial operations.

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Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises

I. Introduction

A. Context, aims and focus of the report

1. In the present report, the United Nations Working Group on the issue of human rights and transnational corporations and other business enterprises looks at the human rights impacts of agro-industrial operations on indigenous peoples and local communities. It examines the roles, duties and responsibilities under the Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (Guiding Principles) (see A/HRC/17/31) of Governments, business enterprises and other stakeholders in preventing, mitigating and addressing these impacts. The aim of the report is to contribute to existing discussions and commitments on responsible agriculture and sourcing and to the forthcoming annual Forum on Business and Human Rights, the overarching theme of which is leadership and leverage.[1] It also provides follow-up to the report of the Working Group on business-related impacts on indigenous peoples (A/68/279).

2. Governments sell, lease, or otherwise grant, domestic and foreign business enterprises access to land and forest for agricultural operations, often resulting in major impacts on the communities that live on, cultivate or use those very lands and forests.[2] Agriculture-driven land conversion is also a key driver of deforestation, in particular of tropical forests and peatlands.[3] It is difficult to obtain precise data on the number and scale of land acquisitions worldwide. One global database indicates that, since 2000, over 1,200 "land deals" have been contracted.[4] The real figure is likely to be higher. The report uses the term "land acquisitions" to encompass all means through which land is obtained by a company for intensive crop production.

3. The Working Group has chosen to focus its discussion on agro-industrial operations with reference to two commodities, namely, palm oil and sugarcane, and on the impacts related to their production at the country level. Palm oil and sugarcane are among the agricultural commodities with the largest land footprint and have similar impacts on the human rights of communities surrounding or using land acquired by plantations and mills.[5]

4. Both sugar and palm oil are low-cost, generic products (compared with cocoa or coffee) found in many consumer products, including processed foods, pharmaceutical products, oleo-chemical products and biofuels. Palm oil is the

[1] Information on the forum is available from www.ohchr.org/EN/Issues/Business/Forum/Pages/2016ForumBHR.aspx.

[2] World Bank, "The practice of responsible investment principles in larger-scale agricultural investments: implications for corporate performance and impact on local communities", Agriculture and Environmental Services Discussion Paper 08 (Washington, D.C., 2014), p. xv.

[3] H.J. Geist and E.F. Lambin, "Proximate causes and underlying driving forces of tropical deforestation", *BioScience*, vol. 52, No. 2 (2002), pp. 143-150.

[4] See www.landmatrix.org.

[5] Oxfam, "Nothing sweet about it: how sugar fuels land grabs", Oxfam media briefing, June 2013.

largest consumed vegetable oil worldwide. Palm oil and sugar production have grown significantly and are likely to continue to do so in the future.[6]

5. The production and growth markets are primarily along or near the tropical belt, in Africa, Latin America and South-East Asia. Oil palm plantations cover nearly 18 million hectares of land, with Indonesia and Malaysia producing over 80 per cent of global palm oil.[7] Sugar is produced in 120 countries, around 80 per cent of which comes from sugarcane (the rest comes from beetroot), grown primarily in Brazil, China and India.[8]

6. Focusing on these two commodities helps to illustrate the salient human rights issues affecting local communities in countries of production, and the roles of all stakeholders in preventing and addressing these impacts. The present report does not, however, offer an exhaustive analysis of the palm oil and sugarcane sectors, and the Working Group acknowledges that these sectors also have distinct economic, financial, environmental and social characteristics.

B. Human rights impacts related to agro-industrial operations

7. In the present report, the Working Group addresses the adverse impacts on "local communities", understood in a broad sense to refer to individuals or groups who are affected by palm oil and sugarcane operations. They include indigenous, tribal and forest-based peoples, traditional hunter-gatherers and fisherfolk, and small landholders. The Working Group examines rights and responsibilities in relation to all types of communities, while clarifying entitlements and duties specific to indigenous peoples.

8. Relevant international human rights instruments and guidelines include the International Covenant on Economic, Social and Cultural Rights, which recognizes everyone's right to an adequate standard of living, the Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security, and the 2012 Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (Voluntary Guidelines on Land Tenure). They affirm the fundamental link between the right to food and access to secure tenure (see A/65/281).

9. The United Nations Declaration on the Rights of Indigenous Peoples and the International Labour Organization (ILO) Indigenous and Tribal Peoples Convention, 1989 (No. 169), among others, specifically recognize the rights of indigenous peoples, in particular their right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as their right to free, prior and informed consent (see A/68/279 and section IV.B below).

[6] See www.strategyr.com/MarketResearch/Palm_Oil_Market_Trends.asp and www.statista.com/statistics/451381/global-sugar-production-forecast/.

[7] Alan Rival and Patrice Levang, *Palms of Controversies: Oil Palm and Development Challenges* (Bogor, Indonesia, Centre for International Forestry Research, 2014) pp. 9-11.

[8] See www.sucden.com/statistics/1_world-sugar-production.

10. Countless cases highlight adverse impacts resulting from agro-industrial operations, including oil palm and sugarcane plantations.[9] Land acquisitions routinely take place without regard for the land and tenure rights of indigenous and non-indigenous communities, and in particular the communal basis for customary land rights, leading to loss of land and property, involuntary resettlement and forced eviction, and reduced access to land used for hunting, gathering or grazing. Land acquisitions also take place with little consultation with potentially affected communities, and impact assessments are often conducted after land leases/contracts are signed. The lack of adequate consultation with communities has also resulted in the destruction of sites of religious, spiritual and cultural significance. Deforestation and loss of land have led to increased food insecurity, malnutrition and mental and physical health issues among communities. As a result, land conflicts have proliferated.

11. Evidence suggests that affected communities rarely obtain effective remedy, with judicial remedies being seen as particularly ineffective and unaccountable. The criminalization of affected community members and human rights defenders continues to mar efforts towards access to justice, in the context of widespread intimidation, harassment and killings of community members and human rights defenders in relation to land acquisitions. Labour rights are also an issue at plantations and mills. Documented cases include child and forced labour, precarious working conditions, health and safety issues, and limitations on freedom of association and collective bargaining.

12. In the following sections, the Working Group discusses the duties and responsibilities of host and home States and of businesses, including financial institutions and traders, in addressing these adverse impacts. It also discusses specific themes of particular relevance and concludes by providing recommendations to a range of stakeholders. The Working Group highlights elements specific to land and tenure rights, as well as the right to consultation and respect for free, prior and informed consent. This in no way implies that other issues such as labour rights are less significant, but the Working Group acknowledges that other entities, notably ILO,[10] are focusing on these issues.

II. Duties of States

13. Under the Guiding Principles, States have the duty to provide protection against human rights abuses perpetrated by business enterprises within their territory and/or under their jurisdiction (Guiding Principle 1). States should consider the full range of measures at their disposal, namely, "a smart mix of measures — national and international, mandatory and voluntary — to foster business respect for human rights" (commentary to Guiding Principle 3).

[9] Cases and complaints of adverse impacts can be found in reports and observations by United Nations special procedures and treaty bodies posted on the OHCHR website (see http://ohchr.org and http://uhri.ohchr.org/en) and on civil society organization websites (e.g., https://business-humanrights.org/en); See also Marcus Colchester and Sophie Chao, eds., *Conflict or Consent? the Palm Oil Sector at a Crossroads* (FPP, Sawit Watch and TUK Indonesia, 2013); and Jodie Thorpe, *Sugar Rush: Land rights and the Supply Chains of the Biggest Food and Beverage Companies* (Oxford, Oxfam International, 2013).

[10] ILO, *Report IV: Decent Work in Global Supply Chains* (Geneva, International Labour Office, 2016).

14. In section II of the present report, the Working Group discusses host States (the operating country) and home States (where a company is incorporated or has its headquarters) separately. Some States might be both home and host States. It also discusses international investment agreements, which are relevant to both home and host States.

A. Host States

1. An environment conducive to respect by business for human rights

15. At the outset it is important to note that State obligations with regard to local communities extend well beyond their duty to protect. Governments have a duty to respect, protect and promote the rights of indigenous and non-indigenous individuals and communities under international human rights law. The manner in which States discharge all of their obligations has an impact on the overall environment in which businesses operate. As stressed in Guiding Principle 3, there is often a failure in State practice to enforce existing laws and policies that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and States should review whether such laws and policies provide an environment conducive to respect by business for human rights. Greater clarity in the laws and policies governing access to land, including entitlements in relation to ownership or use of land, is often necessary to protect both rights-holders and business enterprises.

16. In practice, the protection of indigenous peoples' rights starts with their recognition in national law, which has been provided by a number of States However, there are many other States that have failed to recognize their presence. Not only is the legal framework pertaining to their rights and land-related rights overall not applied, it is often purposely ignored by the very government authorities in charge of enforcing it. The widespread corruption that mars land acquisitions and contracts is a compounding factor. Recommendations have been made to address this underlying cause of many human rights impacts.[11]

17. Another issue concerns inconsistencies between laws protecting indigenous peoples and tenure rights, on the one hand, and national regulations supporting land acquisitions and land markets, on the other. National legislation and sector-specific regulations on land acquisitions should be reviewed to ensure legal coherence and compliance with the duty to protect indigenous peoples and tenure rights. National laws and policies, as well as land reform, registration and titling processes, should recognize and protect the diversity of tenure rights (see A/HRC/13/33/Add.2 and A/HRC/22/46). Laws should also clearly state the conditions under which expropriation for public purpose and evictions are allowed.[12]

18. In addition, in the light of increased attacks against land and environmental rights defenders, the Working Group stresses that protecting human rights defenders

[11] See Olivier De Schutter, International Corporate Accountability Roundtable and Global Witness, "Tainted lands: corruption in large-scale land deals, 2016" (forthcoming); Oxfam, "Poor governance, good business: how land investors target countries with weak governance", media briefing, Ref 03/2013, 7 February 2013; and Voluntary Guidelines on Land Tenure (para. 6.9).

[12] See Committee on Economic, Social and Cultural Rights, general comment No. 4 on forced eviction; report of the Special Rapporteur on the right to food (A/HRC/13/33/Add.2); Voluntary Guidelines on Land Tenure (para. 16.1).

is a core part of the State's duty to protect. In its recent resolution 31/32, the Human Rights Council recognized the important and legitimate role of individuals, groups and organs of society that are defending human rights in identifying and raising awareness of human rights impacts, including in relation to environmental, land and development issues.[13]

19. Besides regulating the process of land acquisition and contracts, Governments could adopt measures to regulate business operations and sugarcane/palm oil production, and include requirements related to environmental and social sustainability. The requirements could take the form of national mandatory certification schemes aligned with human rights standards and those of relevant multi-stakeholder initiatives. The Government of Indonesia, for instance, has taken several initiatives, such as recent moratoriums on peat development and on the expansion of palm oil licenses, and the formation of a peat restoration agency,[14] in addition to having a national mandatory certification scheme (the Indonesian Sustainable Palm Oil Standard).[15] The Indonesian province of Central Kalimantan also adopted Provincial Regulation 5/2011 on Sustainable Plantations, which outlines requirements pertinent to the development of community plantations through community involvement.[16]

2. State-investor contracts

20. Land acquisitions are frequently concluded with a foreign investor (often in partnership with a domestic partner), in the form of a "State-investor contract". Contract negotiations are often affected by imbalances in negotiating capacity between investors and Governments, to the detriment of the protection of rights guaranteed in national law, while there may also be alignment of interests between the Government and an investor to the detriment of local communities.

21. The former Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises noted in his report (A/HRC/17/31/Add.3) that the negotiation process between a host State and a business investor offered a unique opportunity to identify, avoid and mitigate human rights risks. The Special Representative proposed a set of principles for responsible contracts, which are contained in the annex to the report,[17] to help States and business investors to integrate the management of human rights risks into State-investor contract negotiations. A key principle (principle 3) is that the laws, regulations and standards governing the executing of the project should facilitate the prevention, mitigation and remedy of any negative human rights impact throughout the life cycle of the project. This should include the rights of indigenous peoples and land-related rights (see A/68/279).

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[13] See also Voluntary Guidelines on Land Tenure (para. 4.8); and A/71/281.

[14] See www.palmoilpledge.id/en/2016/07/ipop-signatories-support-government-of-indonesias-efforts-to-transform-palm-oil-sector-towards-sustainability.

[15] However, the scheme focuses mostly on compliance with national law. See www.sustainablepalmoil.org/wp-content/uploads/sites/2/2015/09/Efeca_PO-Standards-Comparison.pdf.

[16] See http://earthinnovation.org/wp-content/uploads/2014/09/kalimantan_roadmap_english.pdf.

[17] The annex is entitled "Principles for responsible contracts: integrating the management of human rights risks into State-investor contract negotiations: guidance for negotiators".

22. Overall, adequate policy space to meet the State's human rights obligations should be maintained when pursuing investment contracts (Guiding Principle 9). This is relevant to stabilization causes, and State-investor contracts should not offer protections for investors from future changes in the law that could potentially interfere with the State's efforts to meet its human rights obligations.[18] In addition, the Voluntary Guidelines on Land Tenure (para. 12.10) provide that when investments involving large-scale transactions of tenure rights are being considered, States should strive to make provisions for different parties to conduct prior independent assessments on the potential impacts that those investments could have on tenure rights and food security. The Special Rapporteur on the right to food makes similar recommendations his "Minimum human rights principles applicable to large-scale land acquisitions or leases".[19]

23. Consultations with potentially affected communities and individuals, which meet international standards, and respect for free, prior and informed consent, are key aspects of contract negotiations (see section IV.B below).[20]

B. Home States

1. Setting clear expectations for business enterprises investing in or sourcing from third countries

24. In accordance with Guiding Principle 2 States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations. This includes operations abroad.

25. The Guiding Principles recognize that the understanding of extraterritorial obligations of home States with respect to regulating the human rights impacts of business enterprises domiciled in their territory and/or jurisdiction when operating abroad is evolving. In line with commentary by United Nations human rights treaty bodies, the Working Group considers that States should take steps to prevent human rights abuse abroad by business enterprises that are domiciled in their territory and/or jurisdiction.[21]

26. States should set out clearly the expectation that businesses operating in or sourcing from third countries in sectors where human rights risks are significant, exercise commensurate human rights due diligence. In this regard, palm oil and sugarcane may be considered as "high risk sectors". In a recent initiative, the Governments of Denmark, France, Germany, the Netherlands and the United Kingdom of Great Britain and Northern Ireland encouraged European companies

[18] Principles for responsible contracts (principle 4).

[19] See A/HRC/13/33/Add.2, annex. See also "Guide to implementing the Guiding Principles on Business and Human Rights in investment policymaking", prepared as part of the Investment and Human Rights Project of the London School of Economics and Political Science, available from http://blogs.lse.ac.uk/investment-and-human-rights/files/2016/04/LSE_UNGPs_Guide_en.pdf.

[20] Principles for responsible contracts (principle 7).

[21] See, for example, statement of the Committee on Economic, Social and Cultural Rights on the obligations of States parties regarding the corporate sector and economic, social and cultural rights (E/C.12/2011/1); Committee on the Rights of the Child, general comment No. 16 on State obligations regarding the impact of the business sector on children's rights; and CERD/C/CAN/CO/18 and CERD/C/USA/CO/6.

involved in the palm oil global supply chain to implement the Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises and the Food and Agriculture Organization of the United Nations (FAO)-OECD Guidance for Responsible Agricultural Supply Chains.[22]

27. Reporting requirements for business enterprises on how they address human rights risks is of particular relevance for high-risk sectors, and supply chain transparency for sugarcane and palm oil would be an important step towards addressing adverse impacts. This can entail a requirement that the "parent" enterprise report on the global operations of the entire enterprise, including on their human rights risks and how they are being addressed. An example of such a requirement can be found in the United States Department of State "Burma reporting requirements for responsible investment", which includes land acquisitions.[23]

2. Providing guidance to and assisting business

28. The expectations of home States with regard to business conduct abroad need to be accompanied by effective guidance on how to respect human rights. The Government of the Netherlands, for instance, initiated and is facilitating the development of "sector covenants on international corporate responsibility risks" (including agriculture and banking), in collaboration with employer associations, trade unions and civil society organizations.[24]

29. Government agencies that support and promote investment in third countries, development agencies and diplomatic missions also have a role to play to alert businesses to particular issues related to land distribution and management or to the vulnerability of particular groups such as indigenous peoples or human rights defenders.[25] For instance, CDC (United Kingdom) and DEG (Germany) recently issued a guidance note on managing legacy land issues in agro-industrial investments.[26]

30. As the private sector's contribution to international development assistance increases, the relevance of the Guiding Principles in this context should be more apparent than ever. A number of development agencies have begun referencing the Guiding Principles as a benchmark for the private sector's contribution to development projects. Specific to palm oil and sugarcane, examples include support provided to local communities to engage with authorities and business; the

[22] Amsterdam declaration in support of a fully sustainable palm oil supply chain by 2020, available from www.euandgvc.nl/documents/publications/2015/december/7/declarations-palm-oil.

[23] See www.humanrights.gov/u.s.-governmentapproach-on-business-and-human-rights.

[24] See www.government.nl/latest/news/2016/07/04/ploumen-congratulates-textile-agreement-signatories.

[25] See United Kingdom, *Good Business: Implementing the United Nations Guiding Principles on Business and Human Rights – updated May 2016* (London, 2016), available from www.gov.uk/government/publications/bhr-action-plan.

[26] Available from www.cdcgroup.com/Media/News/News-CDC-and-DEG-produce-guidance-on-managing-legacy-land-issues/.

formulation of national guidelines; and support to business initiatives on sustainable palm oil.[27]

C. International investment agreements and arbitration

31. Over 3,000 international investment agreements (sometimes called "investment treaties"), concluded between two or more States, offer guarantees to investors to protect their investments against adverse State conduct, through broad standards of protection and direct access to investment arbitration. There is increased recognition of the human rights risks associated with such agreements and arbitration.[28]

32. A recent study shows that the majority of farmland deals concluded in low- and middle-income countries since 2000 are protected by at least one investment agreement.[29] By protecting the landholdings of investors, international investment agreements can have a detrimental impact on the legitimate land claims of indigenous peoples and small-scale farmers because indigenous peoples and farmers do not have similar entitlements to remedy, and there are competing interests between protecting the rights of investors and the rights of affected stakeholders, with a clear substantive and procedural advantage to foreign investors (see A/HRC/33/42).[30]

33. All States have a responsibility and role to play in ensuring that international investment frameworks and agreements support rather than undermine human rights. It is also a matter of policy coherence (see Guiding Principles 8 and 9). A key measure would be for States to integrate human rights considerations (including respect for land and tenure rights) when they conclude international investment agreements and in investment policymaking more broadly.[31]

III. Business enterprises

A. Corporate responsibility to respect human rights

34. The corporate responsibility to respect human rights applies to all business enterprises and in relation to all human rights. In section III of the present report,

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[27] See, for example, Norwegian Agency for Development Cooperation, 2014 Results Report: Human Rights and Democracy (Oslo, 2014), available from www.norad.no/globalassets/publikasjoner-2015-/norads-results-report-2014---human-rights-and-democracy.pdf, p. 16; and www.sida.se/globalassets/global/about-sida/private-sector---collected-info.pdf; see also www.palmoilpledge.id/en/2015/09/ipop-and-usaid-signed-collective-agreement-to-establish-green-economy-and-protect-biodiversity-in-indonesia.

[28] See, for example, A/70/301 and HRC/33/42, A/HRC/30/44, A/70/285 and Corr. 1 and A/HRC/33/40; E/C.12/FRA/CO/4 (2016); and "Guide to implementing the Guiding Principles" (see footnote 19 above).

[29] Lorenzo Cotula and Thierry Berger, *Land Deals and Investment Treaties: Visualising the Interface* (London, International Institute for Environment and Development, 2015).

[30] See also "Guide to implementing the Guiding Principles" (footnote 19 above).

[31] See United Nations Conference on Trade and Development (UNCTAD), Investment Policy Framework for Sustainable Development, 2015; 2015 United Nations Convention on Transparency in Treaty-based Investor-State Arbitration; Voluntary Guidelines on Land Tenure (para. 12.15).

the Working Group focuses on the different ways in which businesses across the supply chains of palm oil and sugarcane can be involved in human rights abuses and what actions they are expected to take.

35. In principle, any business, wherever it is in the supply chain, can be involved with human rights abuses through causing, contributing to, or being directly linked to them as a result of its business relationships with other parties. Business relationships are relationships that are formed with business partners, entities in supply chains and any other non-State or State entity directly linked to business operations, products or services (Guiding Principle 13).

36. Business enterprises involved in the supply chain of palm oil and sugarcane are diverse. At the upstream end are growers and producers owning or managing farms and mills — the agro-industrial businesses.[32] They acquire land from Governments or individuals and are the first point of contact with communities and central and local authorities. Some businesses with integrated business models are involved in the full spectrum of the palm oil (and, to a lesser extent, sugarcane) value chain, or a significant part of it, and thus play many roles (acquiring land, cultivation, processing and production, merchandising and trading of sugarcane and palm oil), all of which could lead them to be involved in human rights abuses. Global consumer good companies and retailers occupy a more narrow space at the end of the value chain but may still be involved in human rights abuse, as might financial institutions and traders (see sections IV.D and IV.E below).

37. The way to know and show that an enterprise meets its responsibility to respect human rights is to adopt relevant policies and processes, including with respect to remediation (see section IV. E below), and to provide credible evidence of their effective outcomes, which is discussed in the sections below.

B. Policy commitments

38. According to Guiding Principle 16, business enterprises should express their commitment to respecting human rights through a statement of policy. For businesses operating in and sourcing from the sugarcane and palm oil sectors, such a policy should include commitments to respecting the legitimate land and tenure rights of communities, including those held in customary and communal fashion, and their right to free, prior and informed consent (see also section IV.B below).[33] Such commitments would reflect the fact that in palm oil and sugarcane, as in other agro-industrial sectors, land and relations with communities are salient human rights issues. The policy should be informed by relevant internal and/or external expertise, including experts on indigenous peoples and land.

39. Quite a few growers, producers and consumer goods companies in the sugarcane and palm oil supply chains have committed to respecting land and tenure rights, and indigenous peoples' rights, including the right to free, prior and informed

[32] There are also many small-holders growing sugarcane or oil palm. Because they are not linked to land acquisitions on the scale discussed in the present report and their impacts on human rights are different, the Working Group does not discuss them here.

[33] See Voluntary Guidelines on Land Tenure and the model enterprise policy suggested in the OECD-FAO Guidance for Responsible Agricultural Supply Chains (2016), available from www.oecd.org/daf/inv/investment-policy/rbc-agriculture-supply-chains.htm.

consent, in various policies.[34] These commitments are often made with reference to the International Finance Corporation Performance Standards or the Voluntary Guidelines on Land Tenure. Some have in addition adopted an explicit zero-tolerance policy for land grabs, a key demand of Oxfam's campaign Behind the Brands.[35] In the light of increased attacks against land and environmental rights defenders, the Working Group also encourages agro-industrial companies to follow the lead of companies that have articulated a policy on human rights defenders.[36]

40. Under Guiding Principle 16, respect for human rights must be embedded through in the business enterprise. This includes ensuring that policy commitments are reflected in operational policies and procedures and stipulating the enterprise's human rights expectations of personnel, business partners and other parties directly linked to its operations, products or services.[37]

41. Building the capacity of company staff, suppliers and business partners is key to ensuring that commitments are anchored in practice and that due diligence is effective. Several companies have capacity-building programmes in place that specifically target suppliers. Such programmes should include raising awareness of the relevant human rights of affected communities, including indigenous peoples' rights.

C. Human rights due diligence

42. In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence (Guiding Principle 17). The process comprises four steps: (a) assessing actual and potential human rights impacts; (b) integrating and acting upon the findings; (c) tracking responses; and (d) communicating how impacts are addressed.

1. Overall considerations

43. The commentary to Guiding Principle 17 indicates that where business enterprises have large numbers of entities in their value chain, business enterprises should identify general areas where the risk of adverse human rights impacts is most significant and prioritize these for human rights due diligence.

44. The severity of human rights risks should be the most important factor in prioritizing due diligence and determining the scale and complexity of the processes the enterprise needs to have in place.[38] Companies operating in or sourcing from the sugarcane and palm oil sectors should assume that risks related to land acquisitions

[34] See, for example, the commitments of the Interlaken Group, available from www.interlakengroup.org/annex/company-commitments.

[35] See www.oxfam.org/en/campaigns/behind-brands.

[36] See Institute for Human Rights and Business, Front Line Defenders, Civil Rights Defenders, "Human rights defenders and business: searching for common ground", Occasional Paper Series, Paper Number 4 (2015).

[37] For examples of commitments made, see www.unilever.com/Images/unilever-palm-oil-policy-2016_tcm244-479933_en.pdf; and www.nestle.com/csv/rural-development-responsible-sourcing/responsible-sourcing/land-rights.

[38] Office of the United Nations High Commissioner for Human Rights (OHCHR), "The corporate responsibility to respect human rights: an interpretative guide", 2012, p. 12.

are severe, unless proven otherwise, and should be one of the issues to prioritize for due diligence. In fact, loss of land has dramatic impacts on the livelihoods of individuals and communities, and often land acquisitions are accompanied by violence, further exacerbating the harm.

45. Companies assessing (or wishing to prioritize the assessment of) the particular risks of an operating/sourcing context should, at a minimum, consider the following factors:[39] weak governance and lack of transparency/perceived corruption level; weak land governance and unclear land and tenure rights; the presence and scale of land conflicts between communities and companies/authorities; the level of democratic space for communities and human rights defenders to voice concerns; and the existence of complaints before grievance mechanisms. The scale of production and sourcing is a relevant factor but it should not be the only one.

2. Human rights impact assessments

46. Business enterprises should conduct impact assessments to assess potential and actual adverse human rights impacts. Because human rights situations are dynamic, assessments should be undertaken at regular intervals.

47. The conduct of human rights impact assessments is an emerging field. Several companies at the end of the supply chain are in the process of conducting third-party impact assessments of potential and actual human rights risks (including with regard to land) linked to their suppliers and business partners in sourcing countries. Companies and civil society organizations are starting to draw lessons from these first assessments.[40]

48. While impact assessments should cover all potentially affected human rights, when applied to plantations and mills, they should systematically identify impacts on the land and tenure rights of affected communities. Those conducting the assessments should have expertise in and use sources specific to land and economic, social and cultural rights, such as the Land Matrix.[41]

49. Meaningful consultation with potentially affected groups is essential for assessing adverse impacts, to understand the specific impacts on specific people, in a specific context of operations (Guiding Principle 18). This will ensure the legitimacy and effectiveness of the due diligence process. Such process requires adequate time and resources.

3. Integrate the findings from impact assessments and take appropriate action

50. The third step of due diligence is to integrate findings from impact assessments across relevant internal functions and processes and to take appropriate action.

51. Appropriate action will vary according to whether the business enterprise causes or contributes to an adverse impact or whether it is directly linked only; and

[39] The OECD-FAO Guidance suggests a similar list of "red flag" countries, as set out in box 3.1, p. 33.

[40] Examples include assessments commissioned by The Coca-Cola Company, PepsiCo and Nestlé. An evaluation by Oxfam of the Coca-Cola and PepsiCo assessments in Brazil is ongoing.

[41] See http://landmatrix.org/en/.

according to the extent of its leverage in addressing the adverse impact (see section IV.C below).

4. Tracking

52. Tracking is necessary in order for a business enterprise to know if its human rights policies are being implemented and for it to respond effectively to human rights impacts. Some companies have started tracking their human rights performance. The Working Group urges more companies to do so and to conduct such tracking and measurement through inclusive processes with the participation of other stakeholders, including affected communities (see A/70/216).

5. Communicate externally

53. Communication is the fourth element of due diligence (Guiding Principle 21). While much emphasis has been placed recently on formal and public reporting, what is particularly important here is communication on actual adverse impacts, raised by or on behalf of affected individuals and communities. Companies must be prepared to communicate about the human rights risks they have identified in their operations and what has been done to address the risks.[42] Communication can take many forms, but it needs to be accessible to its intended audience, in this case local communities. Finally, as companies roll out human rights impact assessments they should communicate about methodologies, processes and results. Until now there has been some hesitation from companies to do so.

6. Traceability

54. Traceability is necessary for both tracking and impact assessments. Consumer-facing companies that are several tiers removed from agricultural production may face challenges in ensuring traceability and the sustainability of the entire supply chains since a large portion of their chains consist of a complex web of smallholders, middlemen and third-party suppliers. Nonetheless, companies should systematically work towards a complete picture of their business relationships.[43] Incentives may be higher for companies sourcing coffee or cocoa to trace their origin, given that the origin matters for quality and taste and for consumers. However the traceability of palm oil and sugarcane — back to plantations, not only mills — is essential for preventing and addressing human rights risks.

D. Financial institutions

55. While financial institutions in principle can cause or contribute to human rights abuse, their involvement will often be in the form of "direct linkage", whereby financial institutions are directly linked to an adverse human rights impact by their business relationships (Guiding Principle 13(b)). The Office of the United Nations High Commissioner for Human Rights (OHCHR) has clarified that a direct link between a financial institution's products, services or operations and an adverse

[42] See also OECD Guidelines for Multinational Enterprises and the Principles for Responsible Investment in Agriculture and Food Systems endorsed by the Committee on World Food Security.

[43] OECD-FAO Guidance (see footnote 33 above).

human rights impact can arise through its business relationships with investee companies, project partners, clients and other entities.[44]

56. When it comes to investors, it is important to note that the size of an investor's share is not in itself a factor in determining whether the Guiding Principles apply. It is clear that they apply to investors that hold both majority and minority shareholdings. Rather, the size of the investor's share can be a factor in considering the means through which it meets its responsibility to respect human rights, including the leverage it can exercise in its business relationships. Recent cases before the OECD national contact points have reiterated the responsibilities of finance institutions, including minority investors, in situations of direct linkage.[45]

57. Specific to the sugarcane and palm oil sectors, all mills and plantations require significant capital investment, and all expansion requires capital. There are generally several banks and many minority investors to one company.[46] Hence, financial institutions may be directly linked through loans or equity investment to companies operating in the palm oil and sugarcane sectors whose operations cause or contribute to harm.[47]

58. In the light of the potentially severe impacts on human rights associated with agro-industrial operations overall, and sugarcane and palm oil in particular, some financial institutions are taking steps to strengthen their sustainability or social and environmental risk policies, including on sugarcane and palm oil, while others have divested funds from companies over environmental concerns.[48]

E. Commodity traders

59. Attention to the role of commodity traders, their responsibilities and the leverage they may have is set to increase. Traders have been called upon to "tackle land grabbing and support responsible agricultural investments".[49] For instance, only six traders account for the majority of world sugar trade: a shift in policy on their part could have significant impacts.

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[44] See letter dated 27 November 2013 from OHCHR addressed to the Chair of the OECD Working Party on Responsible Business Conduct regarding the Guiding Principles on Business and Human Rights and the financial sector, p. 5, available from www.ohchr.org/Documents/Issues/Business/LetterOECD.pdf. See also OECD Guidelines for Multinational Enterprises, the Equator Principles (for project finance) and the United Nations Environment Programme Finance Initiative.

[45] See the following national contact points: France, http://mneguidelines.oecd.org/database/instances/fr0014.htm; the Netherlands, http://mneguidelines.oecd.org/database/instances/nl0024.htm; and Norway, http://mneguidelines.oecd.org/database/instances/no0013.htm.

[46] See, for example, Friends of the Earth International, "Wilmar and its financiers: commitments and contradictions", Factsheet (May 2013).

[47] Examples of cases are available from https://business-humanrights.org/en/issues/investment-trade-globalisation/project-financingloans.

[48] See Rabobank Group, "Sustainability policy framework", available from https://www.rabobank.com/en/images/sustainability-policy-framework.pdf; and Norges Bank Investment Management, "Human rights expectations towards companies", available from www.nbim.no/en/responsibility/risk-management/human-rights. Norges Bank Investment Management manages Norway's pension fund, which also divested from four palm oil companies in 2015.

[49] Oxfam, "Nothing sweet about it" (see footnote 5 above).

60. Increased transparency in this sector seems key, such as in the form of increased reporting by traders on environmental, social and governance factors, including human rights. If commodity trading platforms required meaningful information on the sustainability of traded commodities, including on human rights, traders and their suppliers would be incentivized to look at and address human rights impacts related to palm oil and sugarcane.

IV. Specific issues

61. In section IV of the present report, the Working Group discusses issues that are either cross-cutting or seem particularly important to ensure the actual protection of local communities affected by the production of palm oil and sugarcane.

A. Transparency and disclosure

62. In many countries, procedures for decision-making on land acquisitions, including those related to access to information and transparency, do not exist or are not implemented, and contract negotiations are made without the knowledge or consent of communities potentially affected. Often there is no complete official list of land concessions and no public information on impact assessments. Financial institutions are perceived as particularly opaque and as hiding behind "walls of client confidentiality".[50]

63. Confidentiality may sometimes be justified when access to sensitive information may give competitors a commercial advantage. Yet, State-investor contracts are not just commercial transactions — they set the terms and conditions of investment that will directly affect people's lives. Lack of transparency and public scrutiny in contract negotiation and management creates the breeding ground for corruption and deals that disregard public interest. They also fuel resentment by affected communities.[51]

64. Transparency and the rights to access information (including from businesses) and to participate in decision-making are essential safeguards against such practices and are recognized by States in international agreements, such as the United Nations Convention against Corruption and the International Covenant on Civil and Political Rights and, more recently, the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (see A/HRC/30/26).

65. Given the risks that land investments represent for human rights and the public interest, disclosure should be the norm, not the exception, and be seen as an integral part of meaningful community engagement.[52] Information on the terms of State-investor contracts, and data on active land concessions (including on company

[50] Ryan Brightwell, "Banking with principles? Benchmarking banks against the Guiding Principles and human rights", 2nd ed. (BankTrack, June 2016), p.10.

[51] See report of the Special Rapporteur on the situation of human rights in Cambodia, on a human rights analysis of economic land concessions (A/HRC/21/63/Add.1); De Schutter, "Tainted lands" (see footnote 11 above); Lorenzo Cotula, *Land Rights and Investment Treaties: Exploring the Interface* (London, International Institute for Environment and Development, 2015).

[52] Principles for responsible contracts (principles 7 and 10); see also Global Witness, "Dealing with disclosure: improving transparency in decision-making over large-scale land acquisitions, allocations and investments" (April 2012).

management, shareholders and parent companies, concession fees and revenues), among other issues, should be made public (see A/HRC/21/63/Add.1).

66. In Guiding Principle 21, emphasis is placed on the importance of businesses communicating externally on how they address their human rights impacts. Increased and more meaningful transparency by companies helps to build stakeholder trust, including from affected communities. According to the OECD-FAO Guidance for Responsible Agricultural Supply Chains, companies will commit, to the greatest extent possible, to transparency and information disclosure on land-based investments, including transparency of lease/concession contract terms. Some companies have committed to doing so.[53]

B. Consultation with indigenous peoples and local communities, and the right to free, prior and informed consent

1. State duties

67. The State has a duty to consult with indigenous peoples through their own representatives in order to obtain their free, prior and informed consent whenever taking decisions, such as authorizing projects in or near their lands, that have a direct impact on their collective rights and interests.[54]

68. The State duty to consult applies during the project planning stage, prior to the authorization or to entering into contracts and is ongoing throughout the project lifecycle. It is aimed at ensuring meaningful participation in decision-making processes and must be accompanied by participatory human rights, and environmental and social impact assessments. In this regard, consultation and consent protocols, maps addressing community land tenure, or impact assessments developed by the communities themselves should be respected (see A/68/279, paras. 10 and 57; and A/HRC/33/42/Add.1).

69. In the case of non-indigenous peoples, human rights law requires FPIC in certain contexts, for example for groups, such as tribal peoples and other groups, who share similar characteristics with indigenous peoples. In the case of other non-indigenous communities, international human rights law also requires that at a minimum there must be good faith, informed consultations with all affected persons, including women and those particularly vulnerable, and full respect for human rights (see, e.g., A/HRC/4/18, annex 1, paras. 38-39).

2. Core elements of free, prior and informed consent

70. Free, prior and informed consent is an internal process of consensus-building among the concerned indigenous people and a mechanism through which they operationalize their self-governance rights vis-à-vis external actors (see, e.g., A/HRC/4/18, annex 1, paras. 38-39).[55] This implies that processes regarding free, prior and informed consent must, as far as possible, be determined and controlled by the indigenous peoples in question.

[53] See, for example, the land policy of PepsiCo, available from www.pepsico.com.

[54] See the United Nations Declaration on the Rights of Indigenous Peoples, articles 19 and 32; and ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169), articles 6, 7 and 15.

[55] Cathal Doyle C and Jill Cariño, "Making free, prior and informed consent a reality: indigenous peoples and the extractive sector" (2013).

71. The core elements of free, prior and informed consent can be summarized as follows:[56]

- "Free" implies that there is no coercion, intimidation or manipulation, and that the communities are consulted through their self-chosen representatives.
- "Prior" implies that consent is to be sought sufficiently in advance of any authorization or commencement of activities and respect is shown to time requirements of indigenous consultation/consensus processes.
- "Informed" implies that communities have been provided with all the information relating to project plans and activities, and the potential impacts on their rights, and that the information is objective, accurate and presented in a manner and form understandable to them.
- "Consent" must be the objective of consultation, and implies that all affected peoples and communities have the opportunity to decide if they agree to the proposed project or not. This process must include the option of withholding consent.

3. Meaningful consultation by companies

72. Companies should respect the rights of local communities and indigenous peoples to be consulted and to give or withhold free, prior and informed consent, in all their operations, and should protect these rights in the conduct of due diligence. This applies irrespective of a national legislative framework.

73. From a pragmatic perspective, engaging in good faith consultations in order to obtain free, prior and informed consent provides a mechanism through which corporations can avoid the material, legal and reputational risks they will otherwise face. Free, prior and informed consent provides the platform for constructive engagements with indigenous peoples in a manner consistent with the corporate responsibility to respect human rights. It should not be seen as a mere compliance exercise.

74. A number of companies have recognized the ethical and practical imperatives for the commitment to respect free, prior and informed consent. Several have made this commitment without differentiating between indigenous or non-indigenous peoples. Given the distinctive characteristics of indigenous peoples and their collective self-determination rights, implementation of this commitment will necessarily be different in a local community that does not have its own institutional structures and customary laws and processes. In all contexts when attempting to operationalize free, prior and informed consent it is essential to bear in mind the territorial, cultural and self-governance rights upon which the requirement for free, prior and informed consent is premised and to which it seeks to give effect.

[56] The elements have been discussed and defined in various reports, including A/HRC/24/41 and A/HRC/18/42, annex, and in the September 2013 OHCHR fact sheet on the issue, available from www.ohchr.org/Documents/Issues/IPeoples/FreePriorandInformedConsent.pdf.

C. Exercising and increasing leverage

1. Leverage and ways to exercise it

75. Exercising leverage is crucial to ensure that harm is effectively addressed. While it is an inherent part of a company's human rights due diligence under the Guiding Principles, it is also a useful lens that other actors such as multi-stakeholder initiatives could use for deciding which action to take to effect change.

76. Guiding Principle 19 stipulates that when a company is contributing or directly linked to an adverse human rights impact it should use its leverage to mitigate the impact. Leverage refers to the ability of a business enterprise to effect change in the wrongful practices of another party that is causing or contributing to an adverse human rights impact.[57]

77. Leverage is not determined by proximity in the supply chain, and companies further removed from the actual harm may have more leverage than others closer to it. Furthermore, leverage is not limited to situations of control.[58] Companies may have leverage over upstream suppliers and contractors, their partners in joint ventures or other "horizontal" partners, down-stream customers or clients, and the Government.[59]

78. In accordance with Guiding Principle 19, if the business enterprise has leverage to prevent or mitigate the adverse impact, it should exercise it. And if it lacks leverage there may be ways for the enterprise to increase it.

79. Leverage is inherently context-specific and can be exercised in different ways to address a specific business relationship, impact, or local or country context. Companies have different ways to exercise leverage. Results from a workshop held for companies identified five ways a business could exercise leverage:[60] traditional commercial leverage, broader business leverage, leverage together with business partners,[61] leverage through bilateral engagement, and leverage through multi-stakeholder collaboration (see section IV.D below).

80. Guiding Principle 19 notes that if a company faces a situation where it does not have, or perceive to have, sufficient leverage to influence the business entity's behaviour, and cannot increase its leverage, it should consider when and how it might be appropriate to terminate the business relationship, taking into account credible assessments of any potential adverse impact of doing so.[62]

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[57] See OHCHR, "The corporate responsibility to respect human rights", p. 7 (see footnote 38 above).

[58] See https://business-humanrights.org/sites/default/files/documents/Ruggie-letter-Ryder-30-May-2016.pdf.

[59] Shift, "Using leverage in business relationships to reduce human rights risks" (New York, November 2015), pp. 5-6.

[60] Ibid.

[61] See, for example, the Indonesia Palm Oil Pledge, active from 2014 to 2016, available from www.palmoilpledge.id/en/.

[62] See OHCHR, "The corporate responsibility" (see footnote 38 above); and Mariette van Huijstee, Lydia de Leeuw and Joseph Wilde-Ramsing, "Should I stay or should I go? Exploring the role of disengagement in human rights due diligence", Centre for Research on Multinational Corporations (SOMO) discussion paper (April 2016).

2. Addressing systemic obstacles to respect for human rights and sustainability

81. A number of consumer goods companies have recognized the transformative role they can play as major buyers of cane sugar and palm oil. This arguably goes beyond exercising leverage in relation to specific impacts linked to their supply chains but reflects that there are systemic challenges relevant to the wider operations of those companies and that, given the particular position of the companies in the industry, they have the leverage to raise the bar for the entire industry.[63]

82. For the two sectors at play, systemic challenges relate to the lack of market incentives for sustainability and lack of respect of human rights including land-related rights in many countries. One issue is that demands for sustainable palm oil and sugarcane come predominantly from the European market. The low level of certified sugarcane production compared with global production[64] and the existence of alternatives to cane sugar add complexity to exercising leverage in this sector (while demands for and production of certified sustainable palm oil are greater).[65]

83. Exercising leverage collectively, for instance through multi-stakeholder initiatives, is important in addressing these challenges.

D. Multi-stakeholder initiatives

84. Multi-stakeholder initiatives have been established for both the palm oil and sugar sectors, involving the participation of companies from various tiers of the supply chain, financial institutions and civil society organizations. In their various roles — certification schemes, grievance mechanisms and forums for multi-stakeholder dialogue — the initiatives can contribute meaningfully to efforts that address human rights challenges.

85. The Roundtable on Sustainable Palm Oil,[66] Bonsucro[67] and the Roundtable on Sustainable Biofuels [68] require member companies to respect the customary rights of local communities and indigenous peoples, including their right to give or withhold free, prior or informed consent.[69] In line with multi-stakeholder initiative standards,

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[63] See, for example, information from Unilever, available from www.unilever.com/sustainable-living/the-sustainable-living-plan/reducing-environmental-impact/sustainable-sourcing/transforming-the-palm-oil-industry/.

[64] The level of certified sugarcane production is at 3.87 per cent of global production: see http://bonsucro.com/site/in-numbers/ (last accessed 29 July 2016).

[65] The production of certified sustainable palm oil is roughly at 17 per cent of global production: see www.rspo.org/about/impacts (last accessed 29 July 2016).

[66] See www.rspo.org/.

[67] http://bonsucro.com/.

[68] http://rsb.org/.

[69] See "Adoption of the principles and criteria for the production of sustainable palm oil" (2013), available from www.rspo.org/file/revisedPandC2013.pdf; Bonsucro Production Standard V 4.1.1, available from http://bonsucro.com/site/wp-content/uploads/2013/02/Bonsucro-Production-Standard-4.1.1.pdf; and Roundtable on Sustainable Biofuels, "Principles and criteria for sustainable biofuel production: version 2.1. (March 2011), available from http://rsb.org/pdfs/standards/11-03-08%20RSB%20PCs%20Version%202.1.pdf.

a number of companies have developed procedures in relation to customary land rights, conflict resolution, and information-sharing.[70]

86. However, the current indicators for compliance under the Roundtable on Sustainable Palm Oil and Bonsucro's standards tend to focus on the multi-stakeholder process rather than verifiable outcomes. Human rights (for which standard guidance is generally weak) are often poorly addressed in environmental and social impact assessments and audits, which in turn lack independent and transparent monitoring mechanisms.[71]

87. Capacity and resource limitations of multi-stakeholder initiative grievance mechanisms to adequately address the number and types of complaints received, particularly on human rights,[72] and the lack of independent investigations by MSIs of on-site disputes, are ongoing concerns. So are the limited capacity and resources of affected communities and civil society organizations to access and activate these mechanisms. Another challenge lies in balancing multi-stakeholder initiative appeals to companies while remaining sensitive to genuine complaints of abuses. For some companies, financial incentives to retain membership and achieve certification are weak, and when faced with a complaint the companies might therefore decide to withdraw.

88. As part of their transformative role, multi-stakeholder initiatives could play a greater role as convenors and in dialogue with Governments, individual companies and national business associations, in addressing systemic governance gaps and economic disincentives to sustainability and respect for human rights.

E. Access to effective remedy

89. Access to remedy is an essential component of the State's duty to protect and a company's responsibility to respect. It covers both State-based judicial and non-judicial mechanisms and non-State based mechanisms, including operational-level grievance mechanisms. These can be supplemented by the remedial functions of international and regional human rights mechanisms.

90. Access to remedy has both procedural and substantive aspects (Guiding Principle 25). Remedy may include apologies, restitution, rehabilitation, compensation and sanctions, as well as the prevention of harm. In the case of local communities and land acquisitions, remedies must assess impacts on land and tenure rights. Restitution and compensation in the form of land commensurate in quality,

[70] See, for example, corporate communication from IOI Group, "IOI to revise its group sustainability policy", (16 June 2016), available from www.ioigroup.com/Content/NEWS/NewsroomDetails?intNewsID=805; and the forest conservation policy of Golden Agri-Resources, available from www.goldenagri.com.sg/pdfs/sustain_policies/1._GAR_Forest_Conservation_Policy_-_updated_links_10_Jan_2014.pdf.

[71] Grassroots and Environmental Investigation Agency, "Who watches the watchmen? Auditors and the breakdown of oversight in the RSPO" (November 2015).

[72] For example, 62 complaints have been filed to the Roundtable on Sustainable Palm Oil since 2009, of which 19 remain unresolved and 40 per cent pertained to alleged violations of free, prior and informed consent (see www.rspo.org/members/complaints); see also criticism of Bonsucro (www.inclusivedevelopment.net/idi-and-partners-challenge-thai-companys-membership-in-sustainable-sugar-group/).

size and value, or better, are particularly important.[73] Procedures for remedy should be impartial, protected from corruption and free from political or other influences.

1. Limitations of judicial mechanisms

91. Effective judicial mechanisms are at the core of ensuring access to remedy, and States should take appropriate steps to ensure their effectiveness (Guiding Principle 26).

92. In practice, however, victims of business-related human rights abuse face a range of barriers to access effective remedy. Domestic law remedies the world over have been found to be "patchy, unpredictable, often ineffective and fragile", with challenges exacerbated in cross-border cases (as may often be the case in the context of investment) (see A/HRC/32/19, paras. 4-5).

93. Furthermore, many jurisdictions are characterized by legal uncertainty surrounding the extent to which parent companies (and other constituent companies within a business enterprise) have legal responsibilities under domestic law regimes to identify, prevent and mitigate human rights abuses connected with that business enterprise's operations (see A/HRC/32/19). In addition, the lack of clarity across jurisdictions about the respective roles of home and host States often prevents access to remedy for victims. Attempts to hold buyers liable for abuses conducted by suppliers down the supply chain have thus far not been successful.[74]

94. In response, OHCHR has developed guidance for States on enhancing the effectiveness of domestic legal systems, including in cross-border cases (see A/HRC/32/19, annex).

2. Challenges and opportunities of non-judicial grievance mechanisms

95. In the Guiding Principles (Guiding Principle 31), seven effectiveness criteria for non-judicial grievance mechanisms are identified. Mechanisms should be legitimate, accessible, predictable, equitable, transparent, rights-compatible, a source of continuous learning and based on engagement and dialogue. Importantly, the criterion of rights-compatibility demands that outcomes and remedies accord with internationally recognized human rights.

96. Non-judicial mechanisms activated by communities in the context of palm oil and sugarcane include land-dispute mechanisms, national human rights institutions, home-State based mechanisms, complaints mechanisms of international finance institutions (in particular the Office of the Compliance Advisor/Ombudsman,[75] grievance mechanisms under multi-stakeholder initiatives, and the operational level grievance mechanisms of companies. The Working Group highlights some of the limitations and opportunities of these mechanisms below.

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[73] Voluntary Guidelines on Land Tenure and A/HRC/4/18, annex.

[74] See the complaint by Cambodian villagers before a United Kingdom court against Tate & Lyle and T&L Sugars, available from https://business-humanrights.org/en/koh-kong-sugar-plantation-lawsuits-re-cambodia.

[75] The Office of the Compliance Advisor/Ombudsman is the independent recourse mechanism for the International Finance Corporation and the Multilateral Investment Guarantee Agency and has examined quite a few complaints related to agro-industrial operations. See, for example, www.cao-ombudsman.org/languages/french/documents/CAO_10Year_AR_web.pdf.

97. In the case of land acquisitions, relevant State-based mechanisms include mechanisms specifically mandated to solve land disputes, in relation to an existing land demarcation project or land reform, for instance. However, they appear to suffer from the same issues as judicial mechanisms, such as administrative and financial obstacles and the perception of political interference (see A/HRC/21/63/Add.1, para. 177).

98. National contact points of the OECD Guidelines for Multinational Enterprises, as a key (home) State-based mechanism, have the potential to offer redress. A number of "specific instances" have highlighted the impacts of palm oil and sugarcane plantations in Cambodia, Cameroon and Indonesia, with national contact points in Australia, Belgium, France, Luxembourg, the Netherlands and the United States seized.[76] While national contact points have all confirmed that adverse impacts had taken place, results in bringing about change in behaviour or redress for affected communities have been mixed. Civil society organizations have highlighted gaps in human rights protection of the national contact point system overall and have put forward recommendations.[77]

99. While national human rights institutions could also play a relevant role, and some have carried out important inquiries into human rights abuses in the palm oil and sugarcane sectors recently, with respect to Indonesia, Malaysia and Cambodia,[78] in some instances they may not have the mandate to deal with land-related rights. In addition, their recommendations are effective only insofar as States are willing and able to put them into practice.

100. An additional criterion that is stipulated in Guiding Principle 31 for business enterprise operational-level grievance mechanisms is that the mechanisms are based on engagement and dialogue (consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances). Businesses at various tiers of the supply chain have developed such mechanisms and standard operational procedures in relation to customary land rights, conflict resolution and information-sharing in order to guide their activities and interaction with local communities.[79] However, operational ground staff often lack awareness of these mechanisms. The absence of independent monitoring and evaluation procedures, and of independent legal counsel to communities, further limits their effectiveness.

101. Underexplored thus far in this regard, indigenous peoples' mechanisms of customary law have the advantage of being accessible and controlled by indigenous

[76] See http://mneguidelines.oecd.org/database/.

[77] See www.oecdwatch.org.

[78] See Business and Human Rights Centre, "Indonesia: Human Rights Commission's first national inquiry into abuses of indigenous peoples' land rights (2016), available from http://business-humanrights.org/en/indonesia-human-rights-commission%E2%80%99s-first-national-inquiry-into-abuses-of-indigenous-peoples%E2%80%99-land-rights; National Human Rights Commission of Malaysia (SUHAKAM), *Report of the National Inquiry into the Land Rights of Indigenous Peoples* (Kuala Lumpur, 2013); EarthRights International, "Human rights violations in Koh Kong Sugar Plantation in Cambodia confirmed by Thai Human Rights Commission (3 June 2015), available from www.earthrights.org/media/human-rights-violations-koh-kong-sugar-plantation-confirmed-thai-human-rights-commission.

[79] See, for example, Wilmar, "No deforestation, no peat, no exploitation policy" (5 December 2013), available from www.wilmar-international.com/wp-content/uploads/2012/11/No-Deforestation-No-Peat-No-Exploitation-Policy.pdf.

peoples and oriented towards rehabilitation and reconciliation. They could be instrumental in solving long-standing conflicts.[80]

102. Non-judicial mechanisms have often limited ability to address systemic issues and, when conflict-resolution/dialogue is part of their mandate, depend on company cooperation. For instance, one case before the IFC Office of the Compliance Advisor/Ombudsman resulted in the temporary suspension of funding provided by the World Bank Group to the palm oil sector and the adoption of a new framework for the palm oil sector in 2011.[81] However, the systemic irregularities across the specific company's operations were not addressed, and the company's divestment of a plantation where the IFC Office of the Compliance Advisor/Ombudsman was mediating a protracted human rights abuse case led to the termination of the conflict resolution process. National contact point instances reflect similar challenges: in one case, the United States national contact point had to close the instance since the company refused to share information (the same company's refusal to disclose any information also led to its suspension from Bonsucro and its ultimate voluntary withdrawal); and in another case, progress was stalled because the majority owner of a joint venture refused to cooperate.

103. A final lesson suggests that where different mechanisms have been used by communities and non-governmental organizations representing them in conjunction, targeting different actors along the supply chain as well as Governments, they tend to be more effective. However, using multiple mechanisms in parallel requires considerable resources and skills, to which communities and their supporting organizations often do not have sustained or easy access.

V. Conclusion and recommendations

104. **Land investments are among today's most difficult business and human rights issues. When land acquisitions take place without due regard for the human rights of indigenous peoples and local communities living on and using the land, they have major impacts. They lead to hardship and the impoverishment of the communities, violence and countless conflicts between the communities and the companies and government authorities, who often view land in a fundamentally different manner.**

105. **On the one hand, land and forests have social, cultural, spiritual, economic and environmental value to indigenous peoples and other communities — as such, they are essential to the existence of the communities. On the other hand, land is a major economic asset for Governments and companies. The demand for palm oil and sugar, basic commodities used by people worldwide, is increasing, and with it comes continuing and increased pressure on land for sugarcane and oil palm plantations.**

106. **The problems are well known. Addressing them requires extra effort by all stakeholders. While systemic change involves considerable time and**

[80] See A/68/279, paras. 50-51; John Ahni Schertow, "Canadian mining firm admits wrongdoings to Subanon people", *IC Magazine* (25 May 2011), available from https://intercontinentalcry.org/canadian-mining-firm-admits-wrongdoings-to-subanon-people/.

[81] See www.cao-ombudsman.org/cases/case_detail.aspx?id=76.

resources, efforts to prevent, mitigate and address adverse impacts on human rights are both urgent and critical for the affected communities.

107. While the present report discusses at some length the responsibilities of companies, the primary obligations of Governments cannot be ignored. Business-related human rights abuse is often exacerbated by a lack of rule of law, legislation and enforcement in support of the rights of communities. If Governments in production countries were actually ensuring and protecting the rights of indigenous peoples and other communities to their land under international human rights law, land acquisitions would not result in the scale of harm seen today.

108. An obstacle to enforcement is the lack of capacity of central and local authorities in charge of overseeing the allocation and use of land for agro-industrial plantations. At a more fundamental level, a major obstacle relates to the political economy of land and land governance. When the rule of law is absent or out of the reach of the poorest and most vulnerable, decision-making processes related to the access and use of land can easily lead to conflicts of interest, exclusion and discrimination.

109. A weak land governance context makes it more difficult, but all the more important, for businesses to exercise due diligence and take robust measures to prevent, mitigate and remedy negative impacts on communities. The Working Group welcomes the commitments made by a number of business enterprises to respect land rights and indigenous rights in all of their operations, including business relationships. Implementing the commitments, however, is not an easy task. In the present report, the Working Group highlights some of the measures that businesses could take or are already taking. Leverage is essential in this regard, and the Working Group reiterates that business enterprises contributing or with direct linkage to negative impacts through their business relationships should use their leverage to the fullest extent, and increase it when leverage seems inadequate.

110. Communities deprived unlawfully of their land have a right to remedy, and Governments must do much more to ensure the independence, accessibility and effectiveness of State-based remedies. At the same time, businesses cannot stay idle — they must do their part to facilitate remediation of harm suffered, even when this may create tension between them and their business partners, suppliers or Governments.

111. Financial institutions also have a major role to play, but today few seem to accept their full responsibility to respect human rights through their loans or investments. This has real consequences — when finance freely flows without accountability, there is little incentive to respect rights, and both affected communities and businesses trying to address harm find themselves with less influence over the situation.

112. The present report also flags the complementary roles of home States and multi-stakeholder initiatives in closing governance gaps and increasing leverage. The need for such initiatives to address human rights risks more decisively is essential.

113. The Working Group makes the recommendations below to those actors who have not only the duty or responsibility but also the leverage to transform

current practices in agro-industrial operations so that they benefit communities and ultimately the industry as a whole.

114. Recommendations to host States:

(a) Guarantee in law, and protect, the land and tenure rights of local communities and their members, and indigenous peoples' rights, including to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, and to give or withhold their free, prior and informed consent;

(b) Guarantee access to information on land acquisitions, State-investor contracts and land concessions impacting the rights of local communities, in an appropriate form and language;

(c) Ensure that adequate environmental, social and human rights impact assessments are conducted prior to granting land;

(d) Require business enterprises to conduct due diligence and ensure respect for the rights of indigenous peoples and local communities in all their operations;

(e) Maintain the necessary policy space when entering into investment contracts and international investment agreements to protect the human rights of indigenous peoples and local communities. In particular, investor protections should not override the rights of indigenous peoples and local communities;

(f) Ensure access to effective judicial and non-judicial remedies for communities affected by land acquisitions, including land restitution and compensation in the form of land, in particular for indigenous peoples. Remove financial, administrative and other barriers to accessing remedy;

(g) Protect land and environmental rights defenders. Under no circumstances should the judiciary be used to criminalize the legitimate activities of defenders.

115. Recommendations to home States:

(a) Ensure that OECD national contact points are accessible, independent, impartial and competent to address land-related complaints. This includes knowledge of indigenous peoples' rights;

(b) Require companies to conduct human rights due diligence to ensure respect for indigenous peoples and local communities' rights in their supply chains;

(c) Require supply chain transparency;

(d) Adopt and enforce regulations in relation to the human rights impacts overseas of companies domiciled in home States.

116. Recommendations to business enterprises, including financial institutions and traders:

(a) Adopt or strengthen policies on human rights, responsible sourcing or lending, including commitments to respect land and tenure rights, to meaningfully engage with affected stakeholders and to respect the right of

indigenous peoples to free, prior and informed consent, including their right to define the process through which free, prior and informed consent is sought;

(b) Conduct and prioritize human rights due diligence, in particular country- and sector-specific human rights impact assessments, wherever the rights of indigenous peoples or local communities are potentially affected. Due diligence should include the participation of potentially affected indigenous peoples and local communities;

(c) Ensure that operational grievance mechanisms comply with the effectiveness criteria of the Guiding Principles, including consulting indigenous peoples and local communities in relation to their design;

(d) Businesses contributing to or directly linked to adverse human rights impacts on communities in countries of production should exercise or increase leverage to effectively address and remediate harm;

(e) Traders should know and show that the sugarcane and palm oil they trade are not products of human rights abuse.

117. Recommendations to multi-stakeholder initiatives and industry associations:

(a) Take a more decisive role to encourage member companies to improve practices related to human rights, in particular land-related rights;

(b) Carry out independent field investigations where reports of protracted or serious human rights abuses have been reported and confirmed;

(c) Assess independently and through multi-stakeholder consultations the extent to which their grievance mechanisms fulfil the effectiveness criteria set out in Guiding Principle 31;

(d) Increase outreach and awareness-raising efforts about the multi-stakeholder initiatives towards indigenous peoples and local communities;

(e) Promote and participate in cross-sectoral dialogue with other multi-stakeholder initiatives and associations to share lessons learned and recommendations for improvement, in particular on land issues.

118. Recommendations to civil society and international organizations:

(a) Raise awareness of indigenous peoples and local communities about their rights and the remedy mechanisms available to assert the rights and, in line with the decision-making processes of communities, assist in accessing these mechanisms;

(b) Assist indigenous peoples and local communities in documenting and compiling formal evidence towards supporting complaints submitted, such as in the form of written chronologies, documents, photographs and recordings.